United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7551

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-7551

PHILO SMITH & CO., INC. and JAMES E. RUTHERFORD,
Plaintiffs-Appellants,

against

USLIFE CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE USLIFE CORPORATION

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BRIEF OF DEFENDANT-APPELLEE USLIFE CORPORATION

Invoking the District Court's diversity jurisdiction, Plaintiffs-Appellants Philo Smith & Co., Inc. ("PS&Co.") and James E. Rutherford ("Rutherford") brought this action to recover from Defendant-Appellee USLIFE Corporation ("USLIFE") a finder's fee of some $740,000 in connection with USLIFE's 1974 acquisition of All American Life & Financial Corporation ("All American").

Plaintiffs' claim is based on defendant's alleged oral promises to extend, under certain circumstances, written fee agreements that by their terms had expired. The Court below correctly held such claim barred by the New York Statute of Frauds, § 5-701(10) of the General Obligations Law, which expressly prohibits recovery on an oral promise to pay a fee for "negotiating the purchase . . . of

a . . . business. . . ." The Statute provides in relevant part:

> "§ 5-701. **Agreements required to be in writing** Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise, or undertaking:
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> • • •
>
> "10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman. As amended, L.1964, c. 561, eff. Sept. 27, 1964."

The parties are in agreement that New York law applies in this diversity case [135a, n. 4],[1] and that the District Court properly referred to New York law in its decision below, since the material events took place in New York and "New York has the paramount interest in the application of its law in this case." *Intercontinental Planning Ltd.* v. *Daystrom Inc.*, 24 N.Y. 2d 372, 382, 248 N.E. 2d 576, 581, 300 N.Y.S. 2d 817, 825 (1969), *aff'g*, 30 A.D. 2d 519, 290 N.Y.S. 2d 206 (1st Dep't 1968).

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[1] This and similar references are to the Joint Appendix.

Proceedings Below

In its opinion ruling on defendant's pre-trial motion to dismiss, the District Court described plaintiff PS&Co.'s original complaint as seeking relief on two theories: "in straight contract, based upon parol extensions of written agreements," and in *quantum meruit* [Memorandum Opinion 12/20/74, p. 3]. The District Court additionally inferred from the allegations of the first cause of action a third "theory of relief" "based upon promissory estoppel." *Id.*

The District Court sustained the original complaint "insofar as it supported recovery based on the doctrine of promissory estoppel," but the Court dismissed the "straight contract" and *quantum meruit* claims on the ground that such claims were barred by the Statute [128a-129a].

Thereafter, in response to defendant's Rule 19 motion, Rutherford joined as a plaintiff on the amended complaint.

The case went to trial solely on plaintiffs' theory of "promissory estoppel." At the close of plaintiffs' case, the District Court granted defendant's motion for a directed verdict on the ground that as a matter of law plaintiffs had failed to establish the requisite elements of "promissory estoppel." (The District Court's opinion is reported at 420 F. Supp. 1266.) Assuming for the purposes of the motion that defendant had in fact made the alleged oral promises (an issue that was in sharp dispute), the Court concluded that the evidence was insufficient to raise a jury question on a "promissory estoppel" theory:

> ". . . [I]n order to establish their right to recover the finder's fee, the plaintiffs were required to show that all of the remaining elements of promissory estoppel were present with respect to at least one of these promises. First, they had to offer evidence that the promise was fraudulently made. . . . Second, the de-

fendant must have anticipated that the plaintiffs would rely on the oral promise and such reliance must have been reasonable on the plaintiffs' part. . . . Third, the plaintiffs must have relied on that oral promise by engaging in acts which are 'unequivocally referable' to the oral promise. . . . Fourth, the plaintiffs must have suffered substantial injury as a result of engaging in those acts of reliance.

"Looking at the evidence in the light most favorable to plaintiff, as it is [illegible] constrained to do, the court concludes that the plaintiffs have not produced evidence showing that all of these elements were satisfied with respect to any single promise. Indeed, the plaintiffs have completely failed to demonstrate any injury resulting from acts of reliance or that any acts of reliance were 'unequivocally referable' to any oral promise" [137a-138a] (citations omitted).

The District Court, following applicable New York case law, *e.g., Bright Radio Corp.* v. *Coastal Commercial Corp.*, 4 A.D. 2d 491, 494, 166 N.Y.S.2d 906, 909 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 1021, 152 N.E. 2d 543, 177 N.Y.S.2d 526 (1958), recognized that to allow claims for finder's fees based on alleged oral promises would inevitably open the door "wide to possible frauds—the very thing which the statute was designed to prevent" [136a].

For reasons stated in this brief, the District Court was clearly correct both in its view as to the elements of "estoppel" that must be established in order to avoid the Statute of Frauds and as to its conclusion that plaintiffs' evidence with respect to those elements was insufficient. In addition, we will show that, pursuant to recent decisions of the New York Court of Appeals, an oral promise to pay a finder's fee is unenforceable even when "estoppel" is established by the evidence.

Issues Presented for Review

1. ***Under New York Law, Is "Promissory Estoppel" Available as a Means of Avoiding the Statute of Frauds?***

This question must be answered in the negative by virtue of the 1969 decision of the New York Court of Appeals in *Intercontinental Planning, Ltd.* v. *Daystrom, Inc., supra,* in which the Court denied plaintiff's recovery on facts indistinguishable from those at bar.

2. ***Under New York Law, Is Scienter an Element of "Promissory Estoppel"?***

This question must be answered in the affirmative. Assuming *arguendo* the availability of estoppel, plaintiffs were required to prove not only that defendant made the alleged oral promises, but that those promises were made with intent to deceive. Each pre-1969 New York case that addresses the issue holds that *scienter* is an element of estoppel. In those New York cases in which the question of *scienter* is not specifically discussed, the facts demonstrate that the elements of fraud were present.

3. ***Did Plaintiffs' Evidence Establish Questions of Fact for the Jury?***

The answer is in the negative. Even if it is assumed that as a matter of law a defendant can be estopped from relying on the Statute of Frauds, plaintiffs failed to offer evidence sufficient to create jury questions as to (1) defendant's fraud, (2) plaintiffs' unequivocal reliance and (3) plaintiffs' substantial injury.

Statement of the Case

Since plaintiffs' brief contains no separate statement of the facts, we believe that the Court may be assisted if we do so here.

Initial Contacts With All American:

In 1968, plaintiff Rutherford introduced defendant's chief executive officer, Gordon E. Crosby, Jr., to E. E. Ballard, then chief executive officer of All American and a friend of Rutherford [87a, par. 14]. Although he had no fee agreement at that time, Rutherford in 1968 began encouraging Ballard to consider an acquisition of All American by USLIFE. By 1971 Ballard began to "warm up" to such a deal [70a].

In 1971, Rodney G. Hawes, Jr., an employee of PS&Co., approached Ballard about possible acquisitions of and by All American. Ballard, not Hawes, suggested that he might desire to talk to USLIFE [21a-22a]. Hawes then approached Crosby, who informed Hawes that Rutherford had introduced him to All American in 1968 and that recently another finder had suggested to him that All American might be available for acquisition [21a-22a; 88a, par. 17]. Because of those earlier contacts, Crosby explained that he would like Hawes to procure an authorization from Ballard for Hawes to arrange a meeting [22a].

With Rutherford's aid [24a], Hawes procured Ballard's authorization by letter of June 15, 1971 [DX-C,[2] 113a; *see also,* DX-B, 111a]. That authorization was sought and received prior to any agreement by USLIFE to pay a finder's fee to either plaintiff [23a, 25a].

First Fee Agreement/First "Promise"—July 1971:

On July 8, 1971, Crosby and Hawes met for the first time. In the course of that meeting, a fee agreement was drafted which provided that USLIFE's obligation to pay a fee would terminate unless an agreement in principle looking toward an acquistion of All American was

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[2] The prefix "DX" refers to defendant's exhibits, and "PX" refers to plaintiffs' exhibits.

reached by December 31, 1971 [130a]. When Hawes objected to that particular termination date, a second draft was prepared by which the life of the agreement was extended for six months, until June 30, 1972 [130a]. Crosby and Hawes both signed the revised fee agreement, which was dated July 8, 1971. Under that written agreement, PS&Co. had virtually a full year to bring about the "agreement in principle" that was the predicate of its right to receive a fee [PX-1, 95a].

Hawes claims that at the July 8, 1971 meeting Crosby orally promised:

> "If we're still interested in the acquistion at the time of the termination date, we'll be very happy to extend [the fee agreement]" [131a].

Crosby flatly denied making any such promise [Tr. 400].[3] Crosby's contemporaneous memorandum of the July 8, 1971 meeting makes no reference to any oral promise or agreement to extend the fee agreement [PX-19, 103a], and Hawes himself made no written record of this purported promise. Furthermore, although PS&Co. had agreed to share any fee it might receive equally with Rutherford, when Hawes told Rutherford he had entered into a fee agreement with USLIFE he did not inform Rutherford of Crosby's alleged July 8, 1971 promise to extend the arrangement, but rather told Rutherford that PS&Co. would divide equally with Rutherford any fee received "if such agreement in principle is entered into prior to June 30, 1972" [DX-E, 117a]. Indeed, Hawes did not claim to have told Rutherford of that purported promise until a year later [28a].

Plaintiffs now claim that they arranged the "introductions and performed additional services despite the fact they knew the transaction could not be *consummated* be-

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[3] The prefix "Tr." refers to pages of the trial transcript.

fore each fee agreement expired" (emphasis supplied) and, therefore, "they performed their services in reliance on Crosby's promises to extend those agreements" [Plfs. Br. 31]. The factual record simply does not support that claim.

First of all, it was not until after Hawes procured and presented to Crosby Ballard's authorization letter, and after Hawes agreed to arrange a meeting between Crosby and Ballard, that Hawes and Crosby first discussed a fee [25a-27a]. Therefore, prior to any fee agreement, written or oral, Rutherford had introduced Crosby and Ballard, Hawes and Rutherford had procured Ballard's authorization to arrange a meeting and Hawes had agreed to set up a meeting for Crosby with Ballard. If, as plaintiffs now claim, the "sole business of a finder is to arrange an introduction" [Plfs. Br. 23], plaintiffs performed or agreed to perform their services before the alleged promise of compensation was made.

Second, the pivotal, and only relevant, event in terms of USLIFE's obligation to pay a fee was that an "agreement in principle" leading to an acquisition be effected by June 30, 1972. Whether or not the acquisition could be "consummated" by that date is of no relevance. Hawes requested and was given a full year in which to bring about that agreement in principle, and plaintiffs have offered no proof that an agreement in principle could not have been reached within a year.[4]

In the fall of 1971, Hawes arranged two meetings between Crosby and All American. At the first meeting with Ballard, Crosby made an offer for the acquisition of All American that Ballard rejected out-of-hand [131a-132a].

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[4] If Crosby's September 1971 offer to All American, which was rejected because All American did not consider it high enough [Tr. 467-468], had been accepted, there can be no doubt that an agreement in principle could have been reached well before June 30, 1972. In June and October 1973 agreements in principle were in fact reached after discussions of only a few weeks [92a-93a, pars. 42-47].

At the second meeting, Crosby met with Jack Gardiner, President of All American, who made it clear that he had no interest in All American being acquired by USLIFE [90a, par. 28; 56a].

Third, after arranging those two meetings, Hawes—plaintiff PS&Co.'s sole agent with respect to this transaction—failed to take any further action to advance USLIFE's interest in All American [132a].

Instead, Hawes used his new-found friendship with Gardiner to try to interest All American in other acquisitions: one of these—All American's acquisition of General United, announced on December 31, 1971 and consummated in 1973—earned PS&Co. a $275,000 fee [132a] and, in the opinion of both Rutherford and Crosby, seriously impeded USLIFE's attempts to acquire All American [79a, 53a; *see also,* Tr. 179-180].

Second Fee Agreement/Second "Promise"—June 1972:

Prior to the expiration of the July 8, 1971 fee agreement, Crosby sent Hawes and Rutherford a proposed new fee agreement in which USLIFE agreed to pay both PS&Co. and Rutherford the designated fee if an agreement in principle were reached by December 31, 1972 [DX-K, 121a]. This second fee agreement, dated June 26, 1972, was subsequently executed by Hawes on behalf of PS&Co., by Crosby on behalf of USLIFE and by Rutherford [PX-2, 97a; PX-3, 99a].

Hawes claims Crosby made "essentially" the same promise in connection with the 1972 fee agreement as he had made in connection with the previous agreement. Hawes testified that Crosby said:

> "[I]f at the end of the year or after the end of the year if [USLIFE] had a continued interest in acquiring they will review it at that time and extend the agreement" [38a].

Crosby denied making any such promise [Tr. 328-329; 419-420]. Neither Crosby's letter forwarding the 1972 fee agreement to Hawes [PX-2, 97a], nor Hawes' letter to Crosby returning the executed fee agreement [DX-L, 123a] refers to any such promise, nor did Hawes ever make a record of the purported promise. In any event, it is clear that Hawes did not take any action in reliance on the alleged June 1972 promise [132a].

Rutherford has never claimed that Crosby made such promises to him either in 1971 or 1972. Indeed, Rutherford testified that he had no real concern about the length of the fee agreement [71a]; that he was perfectly willing to work without a written agreement [76a-77a]; and that he did not care about the written agreements or their termination dates because, on the basis of prior dealings, he trusted Crosby to pay him a fee if he earned it [78a, 79a-80a] (*see*, pp. 30-31, *infra*):

> "Q. So it is not a matter that you really care about very much, whether there is a date in there or not? A. I would prefer that one not be in there but if I can make a sale to those people on both sides and get them interested in doing something, *the expiration date is immaterial with most of them.* I think Gordon [Crosby] puts [undue] emphasis on it, much as I like him, I have to say that about him.
>
> • • •
>
> "Q. Did you have any conversations about extending the date at all, other than the conversation you told us about on May 30, 1973? A. I don't worry too much about that, Mr. Miller, because in the Reliance Life case, Gordon extended that contract of his own volition because he said that we could not close it within the time specified.
>
> *"I had so much faith in the fellow that the dates didn't matter with me, so long as they were interested"* [78a] (emphasis supplied).

Third "Promise"—October 1972:

In October 1972, Hawes came to see Crosby. Although Hawes claims that during that meeting, Crosby and he discussed USLIFE's interest in acquiring All American and that Crosby said, "We'll take care of the paperwork if we get anything going after the first of the year" [134a], Hawes did not record any such statement either in his contemporaneous memorandum of the meeting [DX-O, 125a], or at any later time. Crosby denied making such a promise [66a]. In any event, Hawes did nothing in reliance on the purported October 1972 promise [141a].

When Crosby met Smith, the principal of PS&Co., three days after his October meeting with Hawes, Crosby informed him that he was disenchanted with Hawes and that he had no intention of entering a new agreement with PS&Co. [134a].

No request to extend the 1972 agreement was made by Rutherford before it expired on December 31, 1972.

In March 1973, Crosby told Hawes that he would not extend the fee agreement, which by then had expired, whereupon Hawes threatened to take All American to another buyer. Crosby replied, "Be my guest" [66a].

Fourth "Promise"—May 1973:

USLIFE eventually acquired All American—not as a result of anything that plaintiffs did, but as a result of certain financial problems within All American which made it vulnerable to an unfriendly acquisition and led Gardiner to call Crosby during the 1973 Memorial Day weekend [54a; 92a, par. 42]. This call came some six months after the second fee agreement had expired.

Rutherford testified that Crosby telephoned him that weekend on the way to meet Gardiner in Chicago to ask him to arrange a meeting with Ballard. When Rutherford asked Crosby to bring the fee agreement up to date, Cros-

by is supposed to have replied, "No problem, no problem" [73a]. This is the only testimony by Rutherford that Crosby ever said anything to him with respect to the term of the fee agreements. Rutherford made no record of that supposed statement. Crosby consistently denied making any such promise, and in 1973 in his discussions with All American's Board and at trial Crosby denied any promise or obligation to plaintiffs [Tr. 382; 59a-60a].

Whether or not Hawes knew of Crosby's alleged May 30, 1973 statement to Rutherford, he did nothing thereafter to further an acquisition.

According to his own testimony, Rutherford's supposed May 20, 1973 telephone call to Ballard and his efforts thereafter to persuade the All American shareholders and directors to approve the proposed acquisition were motivated by his belief in Crosby's willingness to pay a fee without any written agreement [78a, 79a-80a] and to his interest as a shareholder in both companies [141a; 57a; 76a] (*see*, pp. 28-31, *infra*).

USLIFE's Acquisition of All American—February 1974:

In June 1973, an agreement in principle was reached between USLIFE and All American, but that agreement did not lead to an acquisition [93a, pars. 45-46]. When the first agreement in principle terminated in August 1973, USLIFE's obligation to pay a fee had already been void for over eight months.

USLIFE and All American entered into a second agreement in principle in October 1973, some ten months after USLIFE's obligation to plaintiffs had expired, and this agreement led to the actual acquisition in February 1974 [93a, par. 47]. Plaintiffs do not claim that Crosby made any promise with respect to the fee agreements after May 30, 1973.

I.

Estoppel Is No Longer Available in New York To Circumvent the Statute of Frauds.

Plaintiffs claim that defendant made oral promises on which they relied to their detriment. Even if proved, however, such a claim is insufficient under New York law to estop defendant from relying on the Statute of Frauds.

New York's long-standing policy against finder's fee claims based on oral promises stems from the 1949 amendment that brought finder's fee agreements within the Statute (then § 31, subd. 10 of the Personal Property Law). The policy underlying this amendment is explained by the report of the Law Revision Commission:

> "In recent years there have been a substantial number of reported cases of claims for commissions for services rendered in the sale of a going business or a business opportunity. Under existing law there is no requirement that business brokers' contracts for commissions be in writing. The nature of the transactions is such that, in the absence of the requirement of a writing, unfounded and multiple claims for commissions are frequently asserted, and employers often seek to escape liability by denying the fact of employment. These controversies are commonly resolved by juries on conflicting testimony, with the consequent danger of erroneous verdicts." (1949 Report of N.Y. Law Rev. Comm. [N.Y. Legis. Doc., 1949, No. 65(G), p. 615]).

As the New York Court of Appeals stated, "one of the policies embraced by this provision is to protect the principals in the sale of a business interest from the type of claim being asserted here—a claim for a [multi-million-dollar] finder's fee not supported by the *written* evidence."

Intercontinental Planning, Ltd. v. *Daystrom, Inc., supra,* 24 N.Y.2d at 383, 248 N.E.2d at 582, 300 N.Y.S.2d at 826 (emphasis supplied).

In 1964, the Statute was further amended to void all oral agreements or promises with respect to contracts to pay for the service of "negotiating" "the purchase, sale, exchange, . . . of a business opportunity, business, its good will, inventory, fixtures or an interest therein." The Statute defines "negotiating" to include "procuring an introduction to a party to the transaction. . . ."

The amendment further provided:

> "This provision shall apply to a contract implied in fact or in law to pay reasonable compensation."

The Statute, as thus amended, was first construed by the New York Court of Appeals in an action for recovery of a finder's fee based on an oral contract where the plaintiff, to avoid the Statute, sought recovery in *quantum meruit. Minichiello* v. *Royal Business Funds Corp.,* 18 N.Y.2d 521, 223 N.E.2d 793, 277 N.Y.S.2d 268 (1966), *cert. denied,* 398 U.S. 820 (1967). The Court of Appeals held that to allow such a claim would thwart the legislative policy:

> "The nature of the services rendered by business brokers and finders is such that a demand for payment is not usually made until they have completed their services. Thus, to allow recovery for the reasonable value of these services is to substantially defeat the writing requirement.
>
> "We should not ascribe to the Legislature such a paradoxical purpose." 18 N.Y.2d at 527, 223 N.E.2d at 796, 277 N.Y.S.2d at 271-2.

Plaintiff PS&Co. in this action, like the plaintiffs in *Minichiello,* originally claimed alternative recovery in *quantum meruit,* which claim was properly stricken by the District Court on motion of defendant [128a-129a].

Having failed to avoid the Statute of Frauds on a theory of *quantum meruit*, plaintiffs now rely on a theory of "estoppel". But that theory must also be rejected in the face of the New York Court of Appeals' 1969 decision in *Intercontinental Planning, Ltd.* v. *Daystrom, Inc., supra*, which is the controlling authority and which plaintiffs make no attempt to distinguish or discuss in their brief.

Intercontinental was an action to recover a finder's fee for alleged services in connection with a corporate acquisition by Daystrom. Under a written agreement, the plaintiff was entitled to a fee if Daystrom acquired Rochar Electronique. Daystrom's proposed acquisition of Rochar did not take place. Instead, Schlumberger acquired Rochar and thereafter purchased the assets of Daystrom. The plaintiff claimed that after Schlumberger's acquisition of Rochar and before its acquisition of Daystrom, "Daystrom's president orally agreed to extend the terms of the written [fee] agreement to include a merger between defendant Schlumberger and Daystrom." 24 N.Y.2d at 377, 248 N.E.2d at 579, 300 N.Y.S.2d at 8. The Court of Appeals refused to allow the alleged oral agreement to contradict the clear terms of the written contract. It is "well settled," the Court said,

> ". . . that extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." 24 N.Y.2d at 379, 248 N.E.2d at 580, 300 N.Y.S.2d at 822."

The Court further held that "this oral modification of the written agreement also fails to comply with the Statute of Frauds . . . and cannot be enforced." 24 N.Y.2d at 380, 248 N.E.2d at 579, 300 N.Y.S.2d at 823.

Intercontinental is on all fours with the present case. In both, a plaintiff has sought to extend a clear written agreement, complete on its face, by means of an alleged oral promise. *Intercontinental* establishes that under New York law such a claim cannot be entertained.

While *Intercontinental* did not specifically address the theory of "estoppel", rejection of "estoppel" is inherent in the decision. Indeed, the Appellate Division had denied the plaintiff's motion to add claims for "tortious conspiracy" and "misrepresentation" on the ground that such claims

> ". . . are nothing but verbal variations of the original causes of action sounding in express contract and *quantum meruit* dismissed by the order under consideration as barred by the Statute of Frauds. As it would be paradoxical to permit a business finder to recover, despite the absence of a writing, in *quantum meruit,* so too would it be incongruous and subversive of the legislative intent to permit a plaintiff in a finder's fee case to avoid the Statute of Frauds by relabeling his claims a 'conspiracy' and a 'misrepresentation.' (*Minichiello* v. *Royal Business Funds Corp.,* 18 N.Y.2d 521; *Cohon & Co.* v. *Russell,* 29 A.D.2d 221; Personal Property Law, § 31, subd. 10, now General Obligations Law, § 3 5-701, subd. 10.)." 30 A.D.2d 519, 290 N.Y.S.2d 206.

So too would it be "incongruous and subversive of the legislative intent" to permit the plaintiffs in the present case to avoid the Statute by relabeling their claim as one for "promissory estoppel."

Subsequent to *Intercontinental,* the New York Court of Appeals refused to allow "estoppel" in a similar situation. In *Itek Corp.* v. *RCA Corp.,* 32 N.Y.2d 730, 297 N.E.2d 100, 344 N.Y.S.2d 365 (1973), *aff'g mem.,* 39 A.D.2d 679, 332 N.Y.S.2d 117 (1st Dep't 1972), the plaintiff contended that because it had incurred substantial expense and had "lost the opportunity"[5] to rent a building to others in reliance on an alleged oral lease, the defendants should be estopped

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[5] Itek's Brief on Appeal, at 3.

from asserting California's Statute of Frauds on real estate leases.[6] Both the Appellate Division and the Court of Appeals summarily rejected the plaintiff's claim.

Prior to the *Intercontinental* decision a few New York cases had allowed recovery on claims within the Statute of Frauds on the basis of estoppel (none of those cases allowed recovery of a finder's fee). Since *Intercontinental* no New York case has allowed a plaintiff recovery based on estoppel in reliance on an oral agreement within the Statute of Frauds. *Sawyer* v. *Sickinger*, 47 A.D. 2d 291, 366 N.Y.S.2d 435 (1st Dep't 1975), is the only reported decision after *Intercontinental* in which the question of estoppel was even discussed. Plaintiffs cannot rely on *Sawyer*, because the Appellate Division denied recovery. Estoppel, the First Department held, could not even be considered since the plaintiff had not alleged or proved "actual fraud" on the part of the defendant:

> ". . . [I]t is now well settled that, *in the absence of any allegation of actual fraud*, '[a]n oral contract, invalid by the statute of frauds, because by its terms it is not to be performed within one year from the making thereof, is not validated by part performance' . . . ." 47 A.D.2d at 296, 366 N.Y.S. 2d at 440 (emphasis supplied).

This action is not distinguishable from *Sawyer* because of *Sawyer's* reference to part performance [*cf.* Plfs. Br. 14]; estoppel requires, among other things, that the plaintiff make at least a part performance in reliance on an oral promise. In any event, the finder's fee section of the Statute (subdivision 10 of G.O.L. § 5-701), unlike the section involved in *Sawyer*, expressly encompasses "a con-

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[6] Plaintiffs here present the same discredited "lost opportunity" argument when they argue that Rutherford was damaged by losing his "opportunity to seek another purchaser for a company whose chairman he had known for many years" [Plfs. Br. 31].

tract *implied in fact or in law* to pay reasonable compensation . . ." (emphasis supplied). The very terms of the Statute thus rule out the kind of quasi-contractual theory of recovery here advanced by plaintiffs.

Finally, to allow estoppel in a finder's fee action would be totally to destroy the statutory protection afforded in such situations. Unlike other types of claims barred by the Statute, a finder's fee claim is always based on a unilateral contract or promise—if the plaintiff makes an introduction and an acquisition results, the defendant will pay a fee. The finder makes no corresponding promise; he is entitled to his fee only if he brings about the acquisition. Thus, if performance in reliance on an oral promise is all that is required to recover a finder's fee, this section of the Statute would be a complete nullity, and the protection against such claims would be effectively ended.

II.

If "Promissory Estoppel" Is Available under New York Law, It Requires Proof of Fraud. No Such Proof Was Adduced in This Case.

Relying on pre-*Intercontinental* decisions, plaintiffs' claim that "New York courts have held that a party may be estopped from asserting the Statute of Frauds without proof of *scienter*" [Plfs. Br. 11]. Quite apart from the fact that *Intercontinental* has rendered these earlier decisions obsolete, it is clear that these cases do not support plaintiffs' position.

A. *Under New York Law, Fraud Is an Essential Element of Promissory Estoppel.*

More than twenty years before *Intercontinental*, the Appellate Division held that "even though defendant's refusal so to perform may be unconscionable and may result in injury to plaintiff, still *a mere refusal to perform in the*

absence of fraud, seems not enough, in New York, to justify disregarding the statute." Newkirk v. *C. C. Bradley & Son, Inc.*, 271 App. Div. 658, 660-61, 67 N.Y.S.2d 459, 462 (4th Dep't 1947) (emphasis supplied).

At least as early as 1933, New York required a showing of deceit in order for a plaintiff to obtain equitable relief from the operation of the Statute: "An essential element would be deceit and knowledge on defendant's part that he is deceiving the other party, or proof of such facts as would repel the inference of fair and honest conduct on his part." *Wagner* v. *Manufacturers Trust Co.*, 237 App. Div. 175, 178, 261 N.Y. Supp. 136, 140 (1st Dep't), *aff'd*, 261 N.Y. 699, 185 N.E. 799 (1932).

Ignoring the import of these precedents, plaintiffs baldly assert that "[n]o New York authority supports the District Court's ruling" [Plfs. Br. 8]. Plaintiffs rely on two passages from *Williston* to support their notion that in New York the application of promissory estoppel is "result" oriented and does not depend on proof of fraud. In fact, the first passage plaintiffs cite clearly contradicts this characterization of New York law:

> "A court of equity will grant relief where the oral promise was made as a means of imposition and deceit to secure the consideration, but the exercise of its jurisdiction is based not on the oral agreement, but on the fraud." 3 Williston, *Contracts* § 533A at p. 799 (3d ed. 1961).[7]

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[7] To support this statement, Williston cites, among other cases, *Walter* v. *Hoffman*, 267 N.Y. 365, 196 N.E. 291 (1935), and plaintiffs assert [Plfs. Br. 11] that in *Walter* the Court "ruled that the elements of estoppel had been satisfied because the plaintiff's reliance was unequivocally referable to the oral agreement." That statement is simply wrong. *Walter* held that the court could grant judgment for the plaintiff *only to prevent the defendant from perpetrating a fraud on the plaintiff:*

(footnote continued on following page)

The second passage—which does not immediately follow the first, as plaintiffs' juxtaposition of the two quotations would suggest [Plfs. Br. 10]—summarizes Connecticut and Indiana cases to show that in jurisdictions *other* than New York, actual fraud is not necessary to estop defendant from relying on the Statute. But the law of other jurisdictions is of no importance inasmuch as the law of New York is admittedly applicable here.[8]

The few New York cases on which plaintiffs rely provide no support for their contention that proof of *scienter* is not an essential element of their case.

Wikiosco, Inc. v. *Proller*, 276 App. Div. 239, 94 N.Y.S. 2d 645 (3d Dep't 1949), involved only the question whether the complaint stated sufficient facts to constitute a cause of action. The Court found the complaint sufficient to the extent that it "state[d] facts which, if true, disclose a situation where the protection of the statute, if accorded, would work a fraud upon the plaintiff, its creditors, and its incorporators." 276 App. Div. at 240, 94 N.Y.S. 2d at 647.

In *Rosenbaum-Grinnell, Inc.* v. *International Textile, Ltd.*, 15 Misc. 2d 450, 182 N.Y.S. 2d 441 (Sup. Ct. N.Y. 1958), the only issue before the Court was whether an arbitration clause in a contract applied to a claim "that the

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(footnote continued from preceding page)

> "The basis for the invocation and exercise of the power of a court of equity to compel specific performance of an oral agreement, in such circumstances, is 'that otherwise one party would be enabled to practice a fraud upon the other, and thus it would sometimes happen that a statute intended to prevent frauds would operate to secure one party the fruits of fraud.' [citation omitted]" 267 N.Y. at 368, 196 N.E. at 292.

[8] New York is not the only jurisdiction which requires proof of actual fraud, and not simply irremediable injury to plaintiff, as a predicate for estoppel. *See, e.g., Swift* v. *Peterson*, 240 Iowa 715, 37 N.W. 2d 358 (1949); *Stelmack* v. *Glen Alden Coal Co.*, 339 Pa. 410, 14 A.2d 127 (1940); *Skillman* v. *Lynch*, 74 S.D. 212, 50 N.W.2d 641 (1951).

failure to deliver within the time prescribed in the contract was due to respondent's compliance with petitioner's request to hold up delivery until a spongers' strike was over." 15 Misc. 2d at 51, 182 N.Y.S. 2d at 442.

In *Imperator Realty Co.* v. *Tuli*, 228 N.Y. 447, 127 N.E. 263 (1920), while *scienter* was not specifically discussed, fraudulent intent was readily apparent.[9]

In short, the New York cases prior to *Intercontinental* permitted avoidance of the Statute only to prevent outright fraud. Since *Intercontinental*—at least in finders-fee cases, where the Statute expressly bars claims based not only on oral contracts but on "contract[s] implied in fact or in law"—recovery can only be obtained where there is an agreement "supported by the written evidence." 24 N.Y.2d at 383, 248 N.E.2d at 582, 300 N.Y.S.2d at 826. No such claim is asserted here.

B. *There Is No Evidence of Fraud Here.*

Relying on testimony by Hawes and Rutherford, plaintiffs contend that on four occasions Crosby orally promised to extend the written fee agreements beyond their stated expiration dates, if he were still interested in acquiring All American at that time [Plfs. Br. 16]. Although Crosby denied making any such promises, for purposes of ruling on defendant's motion to dismiss the Court below assumed that Hawes' and Rutherford's testimony was correct [137a].

Inasmuch as the Statute bars enforcement of an oral promise of this nature, the Court considered whether plaintiffs had established all the elements of promissory estoppel, the first of which is fraud: "First, they [the plaintiffs]

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[9] Plaintiffs also cite several cases involving waiver of the Statute of Limitations [Plfs. Br. 11-13]. Those cases are irrelevant because the Statute of Limitations is a waivable, procedural device, whereas the Statute of Frauds is a provision of substantive law. In any event, there is no issue of waiver in this case.

had to offer evidence that the promise was fraudulently made" [137a]. Under New York law, the Court said, "one who seeks to show that a statement was fraudulently made must demonstrate, at a minimum, that the maker of the statement represented facts of which he had no actual knowledge or stated a present intention when he in fact had formulated no intention one way or the other" [138a]. After reviewing the record, the Court concluded that no evidence of such fraud had been adduced [138a-140a]. This ruling, we submit, was clearly correct.

In an attempt to establish Crosby's intent to deceive, plaintiffs called Crosby to the stand during the presentation of their case and examined him as to his state of mind at the times of his alleged promises. Crosby consistently testified that he had *no intention one way or the other* about renewing each fee agreement at the time he signed it, but that by October 1972 he had decided not to renew the fee agreement [64a-69a].

Crosby testified that he did not consider whether to extend the July 8, 1971 fee agreement at the time he signed it:

> "Q. At this time you didn't intend to extend the agreement when you signed it? A. I didn't intend or not intend.
>
> "The Court: I think he testified it wasn't a matter that they considered one way or the other.
>
> "Q. Is that correct, Mr. Crosby? A. I said the same thing with different words" [61a].

As the District Court pointed out, at the time Crosby signed the two written agreements

> ". . . he stated only that he would renew the agreements *if* USLIFE was still interested in the acquisition. In no way did Crosby promise to renew the agreements. At best, he promised only to reexamine the status of the defendant's acquisition plans at the

> expiration of each agreement and to extend the agreements if USLIFE were still interested" [138a-139a] (emphasis in original).[10]

There is, as the Court below noted [139a], no evidence to show that at the time the first two alleged promises were made Crosby intended *not* to re-examine the status of the fee arrangement and no evidence to show that he had formed an intention one way or another on whether to extend it. The absence of such evidence, the Court concluded, is "fatal" to the plaintiffs' claim [139a].

Even plaintiffs' own brief demonstrates that they failed to offer evidence of fraud. They state that:

> "Crosby himself testified that on each of those occasions he had not formed any intention at all about a renewal. Crosby's testimony leaves no doubt that, when he made these promises, he had not considered renewing the agreement even if he were still interested in the acquisition on the termination date" [Plfs. Br. 17].

At most, plaintiffs merely claim that Crosby failed to fulfill an alleged oral promise to review the status of the relationship. Thus, even if plaintiffs are accurate in their characterization of Crosby's testimony, such testimony does not demonstrate fraud. In fact, it negates any inference of fraud.

First Alleged Promise

The oral promise that Crosby supposedly made at the time the agreement of July 8, 1971 was signed does not

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[10] Plaintiffs' claim that there was "no testimony at trial about any promise to 'reexamine the status of the relationship'" [Plfs. Br. 17] is clearly in error. Hawes testified that in 1972 and 1971 Crosby promised to "review" the agreements when they expired [38a].

give plaintiffs any claim for relief because that first fee agreement was in fact extended. Crosby testified to the extension:

> "Q. You did enter into a second fee agreement, but other than that period of time when you entered into the second fee agreement, you never considered this question of extending it or renewing it any other time, right?
>
> • • •
>
> "A. Look, we had an agreement for a year. Everybody exerted their best efforts to make an acquisition. We couldn't. At the expiration of the first agreement, which was in existence for twelve full months, I had an interest in All American. When the first one expired, I didn't think there was a chance to acquire it but—"
>
> • • •
>
> "A. After we had invested a year of time in the transaction, although I didn't think that there was a chance that it could be acquired, I did agree to enter into a second agreement, because I certainly wanted to clear up the relationship with Rutherford, Philo Smith and ourselves. That is a matter of record.
>
> "We all willingly—nobody twisted our arms—signed an agreement which had a terminal date, December 31, 1972" [68a].

Thus, Crosby did in fact review the status of the relationship in June 1972 and did in fact determine to continue it for another six months. The alleged promise of July 1971 called for no more than that.

Second Alleged Promise

In June 1972, when the first written agreement was extended, Crosby had made no decision as to any additional extensions [61a-62a]. There is no evidence to the contrary.

The evidence shows that Crosby did in fact "reexamine the status" before the agreement expired, and his decision was to allow the agreement to terminate in accordance with its terms. When Smith visited Crosby in October 1972, shortly after the alleged promise made to Hawes on October 24, 1972, Crosby told Smith in no uncertain terms that he was not planning again to extend or renew the agreement [56a] (*see*, p. 33, *infra*).

Third Alleged Promise

The Court below assumed that when Crosby met Hawes in October, 1972 "plaintiffs' evidence shows that it was then Crosby's intention not to renew the second [written] agreement", but because Hawes did nothing in reliance on the alleged October 1972 promise, the District Court appropriately concluded that "any fraud with respect to that promise was without significance" [139a].

Fourth Alleged Promise

Finally, with respect to the alleged promise made on May 30, 1973, when Crosby supposedly told Rutherford that there was "no problem, no problem" about updating the agreement, the Court below quite correctly noted that there was a lack of evidence that either Rutherford or PS&Co. relied on this promise to their detriment or took any act "unequivocally referable" to it [141a-142a].

Moreover, the bare statement "no problem, no problem" cannot be classified as a promise at all. Its terms are so indefinite as to be non-existent. Even the promisee(s) are unidentifiable [84a] (*see*, pp. 30-31, *infra*).

In short, the District Court was clearly correct in its conclusion that, viewing the evidence most favorably to plaintiffs, plaintiffs failed to demonstrate fraud.

III.

Plaintiffs Failed To Prove That Their "Acts" Were "Unequivocally Referable" to the Purported Oral Promises or That They Suffered "Substantial Injury" in Reliance on Such Purported Oral Promises.

As the Court below held, "promissory estoppel" requires proof not only that there was fraud in the making of an oral promise, but that the plaintiffs relied on that oral promise by engaging in acts that were "unequivocally referable" to such promise and must have sustained "substantial injury" as a result [137a]. No such evidence is present here.

A. *"Unequivocally Referable"*

Only acts for which there is *no reason other than reliance* on the alleged oral promise are sufficient to meet the "unequivocally referable" test. The landmark case of *Wheeler* v. *Reynolds*, 66 N.Y. 227 (1876), explains the rule:

> "*Generally if* [*plaintiff's acts*] *are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement. The acts should be so clear, certain and definite in their object and design as to refer exclusively to a complete and perfect agreement, of which they are a part execution.* [Citations omitted.] The object of the statute is to prevent frauds and perjuries, and hence courts of equity will take no notice of agreements depending upon parol evidence and otherwise within the statute, unless there are acts of part performance which go along with, relate to, and confirm the agreement, and which were clearly done in part execution thereof, and thus with the parol evidence

establish the existence of the agreement." 66 N.Y. at 231-232 (emphasis supplied).

See also, Sleeth v. *Sampson,* 237 N.Y. 69, 142 N.E. 355 (1923); *McKinley* v. *Hessen,* 202 N.Y. 24, 95 N.E. 32 (1911).

In *Burns* v. *McCormick,* 223 N.Y. 230, 135 N.E. 273 (1922), the Court of Appeals in an opinion by Judge Cardozo refused to enforce a decedent's alleged oral promise to leave the plaintiffs his home if plaintiffs lived with him and cared for him until his death. Although plaintiffs moved into decedent's home and cared for him, the Court of Appeals found that their performance could be explained by reasons other than the promise — *e.g.,* salary, board, lodging and affection.

In *Bright Radio Laboratories* v. *Coastal Commercial Corp., supra,* the Court phrased the rule as follows:

> "In other words, the performance must be such as will admit of *no other possible explanation* except one pointing directly to the existence of the oral agreement claimed." 4 A.D. 2d at 493, 166 N.Y.S. 2d at 910 (emphasis supplied).

And in *Bakhshandeh* v. *American Cyanamid Co.,* 8 A.D. 2d 35, 185 N.Y.S.2d 635 (1st Dep't 1959), *aff'd,* 8 N.Y.2d 981, 169 N.E.2d 188, 204 N.Y.S. 2d 881 (1960), an action in which the plaintiff relied on an alleged oral agreement to extend the termination date of a contract, the court reiterated the requirement that the acts of plaintiff must have no possible explanation other than reliance on the supposed oral representation:

> "Plaintiff also urges, in any event, that in view of his performance, or part performance, of what he claims to have been new consideration for the extension of the termination date, the statute is inapplicable. However, we have held that part performance, in order to avoid the statute, must be 'unequivocally

> referable' to the oral agreement sought to be enforced. [Citation omitted.] *That element is here absent because what plaintiff claims to have done under the oral agreement could very well have been done in his own self-interest in the performance of the original contract.*" 8 A.D. 2d at 38, 185 N.Y.S. 2d at 638 (emphasis supplied).

In this case, plaintiffs' contention that they met their burden of proof with respect to unequivocal referability is as untenable as their argument that such a burden should not have been imposed at all. Plaintiffs assert that they "had *no motive* for rendering their services after each of the fee agreements was executed other than the substantial fee itself and Crosby's oral promises to extend the written agreements" [Plfts. Br. 25] (emphasis supplied).

Rutherford, however, testified at trial that he did not "worry much about those termination dates" [77a-78a] because such dates are generally "immaterial":

> "Q. So [a termination date] is not a matter that you really care about very much, whether there is a date in there or not?
>
> "A. I would prefer that one not be in there but if I can make a sale to those people on both sides and get them interested in doing something, the expiration date is immaterial with most of them" [78a].

In the very portion of Rutherford's testimony that plaintiffs cite in support of their position [Plfs. Br. 27], Rutherford again made clear he was not much concerned with the issue of "termination dates" on fee agreements. On cross-examination, Rutherford testified as follows:

> "Q. You told me that time during the first deposition that from 1968, when you first made an introduction, you kept working on the possible acquisition 'without any let-up,' is that right?

"A. As I recall it, that is correct. I don't try to get a letter the first thing, Mr. Miller. No use cluttering up the files.

"I wanted to see some evidence of interest. The minute I see that on both sides, then I endeavor to get the fee letter.

"Q. But you kept working on it without the fee letter, right on?

"A. Yes, sir, I did.

"Q. You told me also when you talked about what would have happened if you hadn't gotten the fee letter, would you have kept on working until things got closer?

"A. I would have kept on doing two things: keeping Ballard warm, Crosby warm, and trying to get the fee letter—three things.

* * *

"Q. Did that setting up of that meeting have anything to do with that written fee agreement that Rod had gotten from Gordon?

"A. Well, I don't know. But I would like to say that if we didn't have the fee letter at that time, we were anxious to get it. If we did have it, when I get a fee letter I don't stop.

"Q. You really get to work, don't you?

"A. Well, you work before you get one, Mr. Miller.

"Q. Either way you were going to set up a meeting with Ballard and Crosby to see what you get moving?

"A. Get the parties together. You have to do it" [77a].

Considerable evidence was presented at trial to show that factors other than the purported oral promises could have motivated these plaintiffs to act to bring about the transaction at issue. As the District Court noted, PS&Co. "performed all its acts during the time periods of the two written agreements" [141a], and therefore its actions

could not, even in the most favorable light, be deemed *unequivocally* referable to the purported oral promises; it is at least as likely that it acted on the basis of the written fee agreements.

As for Rutherford, who "performed acts in 1973 following termination of the second written agreement" [141a], the Court below appropriately concluded that these acts may well have been motivated by the fact that he was a substantial stockholder of All American and therefore stood to profit from the proposed acquisition [141a].

Moreover, as shown above, Rutherford repeatedly insisted at the trial that he was not much concerned about the termination date, especially since Crosby had previously extended the first written agreement when the acquisition was not made within the original time period [141a]. The Court was therefore fully justified in concluding that Rutherford's 1973 activities were not "unequivocally referable" to any oral agreement to extend the termination date.

In addition, the purported oral promise made to Rutherford in May 1973 was made a full six months after the expiration of the second fee agreement; if such a promise was in fact made, it was a wholly new agreement, not merely an extension of the long-expired written agreement. But quite apart from the Statute, Rutherford's conversation with Crosby on May 30, 1973 touched on none of the subjects necessary to constitute a complete, legally enforceable agreement. In testifying about Crosby's purported oral promise on May 30, 1973 "to bring the fee letter up to date", Rutherford was asked the following questions:

> "Q. Let me ask you, Mr. Rutherford, did you know what the amount of the fee would be if you brought it up to date; was there any discussion about that?
>
> "A. No.

"Q. Or did you know whether Hawes was going to be a party to it?

"A. Oh, Hawes would have been.

"Q. Well, did you talk to Crosby about that?

"A. No.

* * *

"Q. [Y]ou didn't talk to Crosby about whether he would be willing to update it with Hawes, did you?

"A. No.

"Q. Or with Philo Smith, you didn't ask him about that?

"A. No, it didn't come up" [84a-85a].

Plaintiffs now attempt to shrug off evidence of Rutherford's and Hawes' other motives by seeking to minimize the quantitative dollar value of Rutherford's (and Hawes') individual stock ownership in All American [Plfs. Br. 26-27]. But it makes no difference what dollar value is ascribed to these holdings, for as long as other motives for plaintiffs' actions exist, these actions cannot be *unequivocally* referable to the purported oral promises.

Plaintiffs erroneously assert that in the course of trial the "District Court ruled that testimony concerning stock ownership by the plaintiffs in All American was not relevant to the question whether their services were 'unequivocally referable' to Crosby's oral promise" [Plfs. Br. 26]. With respect to a question by plaintiffs' counsel regarding the size of the fee Hawes would have received if the transaction had been consummated at a certain point in time compared to his possible profit resulting from his stock ownership in All American, defense counsel objected, not on the ground of relevance, but on the ground that the question was improper because it was hypothetical. The District Court sustained defense counsel's objection (although the question had already been answered and the jury was not instructed to disregard the answer) and plaintiffs' counsel did not press the matter [Tr. 64-65].

That the Court did not rule that the subject of stock ownership was irrelevant is made clear by the fact that defense counsel on cross-examination was allowed to inquire into Hawes' profit from his transactions in the stock of All American. Plaintiffs' counsel objected to such inquiry on the erroneous ground that he had been blocked from making the same inquiry, but the Court permitted the question to be answered [Tr. 90-92]. Thus, the issue was never ruled irrelevant, as the Court's final opinion makes clear [141a].

In sum, even when viewed in the light most favorable to plaintiffs, the evidence does not establish that either plaintiff performed any act with *unequivocal* reference to the alleged oral promises of Crosby.

B. *"Substantial Injury"*

Here too, plaintiffs have failed to sustain their burden of proof.

The only injury plaintiffs claim to have incurred as a result of their reliance on Crosby's purported oral promises is the loss of "the opportunity to seek another purchaser" for All American [Plfs. Br. 31]. Plaintiffs now assert that they "would not have continued to work for the acquisition had Crosby told them they would not be paid" [Plfs. Br. 31]. Such a claim, even if proven, does not amount to the irremediable change of position necessary to satisfy the "substantial injury" test.

Rutherford himself contradicted that assertion by his testimony that termination dates were essentially "immaterial" to him and that even without a fee agreement he would have continued to keep the deal "warm" (*see*, pp. 28-30, *supra*). Hawes' testimony established that after the written agreements had expired, he did nothing whatever to bring about the transaction between USLIFE and All American. Indeed, he made every effort to direct All American elsewhere [34a].

The claim that plaintiffs, in reliance on Crosby's oral promises, refrained from pursuing other potential buyers for All American also flies in the face of the fact that, in early 1973, Hawes and Smith threatened to sell All American to someone else unless Crosby would agree to pay them a fee. Crosby testified without contradiction:

> "Smith and Hawes came to see me and I told them they had no commitment. They threatened me, said, 'If you don't pay us a fee, we'll sell it to somebody else,' and my response was, and it is in the record, 'Be my guest'" [66a].

Thus the contention that plaintiffs lost an opportunity to sell All American to others because of their reliance on Crosby's oral promises to extend their fee agreement is contrary to the evidence.

It is clear that a plaintiff must demonstrate "substantial injury" as a result of his reliance on an oral promise in order to establish promissory estoppel. In *Woolley* v. *Stewart*, 222 N.Y. 347, 118 N.E. 847 (1918), the Court of Appeals refused to enforce an oral contract for the conveyance of real property because the plaintiff had made no showing of an irremedial alteration in his position in reliance on the promise:

> "A party to the agreement may legally and rightfully refuse to recognize or perform it. *The breach of a void agreement is not a fraud or a wrong in law.* [Citation omitted.] He may, however, withdraw himself from the policy and defense of the statute, or waive its protection, by inducing or permitting without remonstrance another party to the agreement to do acts, pursuant to and in reliance upon the agreement, *to such an extent and so substantial in quality as to irremediably alter his situation and make the interposition of the statute against performance a fraud. In such a case a court of equity acts upon*

> *the principle that not to give effect to those acts would be to allow the party permitting them to use the statute as an instrument defending deception and injustice.*" 222 N.Y. at 350-51, 118 N.E. at 848 (emphasis supplied).

Accord: M.H. Metal Products Corp. v. *April*, 251 N.Y. 146, 167 N.E. 201 (1929). *See also, Triple Cities Constr. Co.* v. *Maryland Cas. Co.*, 4 N.Y.2d 443, 151 N.E.2d 856, 176 N.Y.S. 2d 292 (1958).

In the present case plaintiffs have failed to show they irremediably altered their position as a result of their reliance on the alleged oral promises. The lack of such proof alone is fatal to their claim of promissory estoppel.

Finally, plaintiffs also failed to offer any proof of their incurring any significant expense in reliance on the promise. As shown above, any expense incurred prior to December 31, 1972 must have been in reliance, at least in part, on the written agreements. The only expense thereafter is alleged to be the cost of Rutherford's ten-cent telephone call to Ballard on May 30, 1973. Surely, such expense does not justify voiding the statutory protection afforded to defendant.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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January 31, 1977

[redacted]
United States Court of Appeals for the Second Circuit

Philo Smith & Co., Inc. and James E. Rutherford,
Plaintiffs-Appellants,
against
USLIFE Corporation,
Defendant-Appellee

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

Bernard S. Greenberg being duly sworn,

deposes and says that he is over the age of 21 years and resides at 162 East Seventh Street, Borough of Manhattan, City of New York

That on the 31st day of January 1977 at 140 Broadway, New York, N.Y.

he served the annexed Brief of Appellee USLIFE Corporation upon

Dewey, Ballantine, Bushby, Palmer & Wood, the attorneys for Plaintiffs-Appellants

in this action, by delivering to and leaving with said attorneys

two true copies thereof.

DEPONENT FURTHER SAYS, that he knew the person s so served as aforesaid to be the person mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 31st day of January 1977

Roland W. Johnson

Bernard S Greenberg

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977